

## **REMARKS**

Applicants wish to thank the Examiner for reviewing the present patent application. Applicants also acknowledge and appreciate that the terminal disclaimer has been entered and that the obviousness-type doubling patent rejection is now moot. Furthermore, Applicants reaffirm the election of claims 1 and 3-18, but believe that all claims of record may be examined without serious burden to the Examiner. Nevertheless, Applicants will consider the cancellation of non-elected claim 19 upon an indication that the elected claims are in condition for allowance.

Applicants also submit that the present Final Rejection is premature and that the rejection should be deemed non-final.

### I. Objection to Claims

The Examiner has objected to claims 5 and 6 and alleges that the same are in improper dependent form since they fail to further limit the subject matter of a previous claim. Applicants have amended claim 5 in order to respond to the Examiner's comments. Such amendment should now render the Examiner's objections moot.

### II. Rejection Under 35 USC §102(b)

The Examiner has rejected claims 1, 3, 7, 8, 15 and 16 under 35 USC §102(b) as being anticipated by Frutin, WO 98/36671 (hereinafter '671). In the rejection, the Examiner mentions, in summary, that the '671 reference describes a frothed beverage that includes a sparingly soluble effervescent inducing gas. The Examiner further mentions

that the pressure of the container is described and that the pressure is sufficient to cause the beverage to be discharged into the mouth of the consumer. Moreover, the Examiner continues by mentioning that a container with an aerosol valve that can be closed is described and this prevents opening of the container when the same is inverted. In view of the above, the Examiner believes that the novelty rejection is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Applicants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, the invention of claim 1 is directed to a beverage product comprising a dispenser and beverage in which the dispenser has a container for holding the beverage and a valve which is bias to a position where it seals the container, but which is operable to enable the beverage to be dispensed from the container, but which is operable to enable the beverage to be dispensed from the container and in which the beverage is a liquid having a sparingly soluble effervescence inducing gas dissolved therein, the beverage product being characterized in that the beverage is held under a gaseous pressure in the head space above the liquid beverage in the container that is sufficient to cause the beverage to be discharged directly into the consumer's mouth from the dispenser as an effervescent fluid when the valve is opened wherein the beverage is held under a gaseous pressure in the head space of at least 2.5 atmospheres at 5-15°C.

The invention of claim 1 is further defined by the dependent claims which claim, among other things, the type of sparingly soluble effervescent inducing gas, the amount of

liquid beverage and effervescence inducing gas, that the valve may be aerosol, that the head space within the container comprises between 10% and 80% of the volume of the container and that the beverage product includes a means for preventing an opening of the valve when the dispenser is inverted.

In contrast, the '671 reference is directed to a method of producing a frothed liquid. In the '671 reference (looking at, for example, Figure 1) a container having a liquid 18 is fitted with a straw 20 and a device 24 to keep the straw afloat. The contents in the container or bottle are pressurized through a cap 16 via a one way valve in the cap. The consumer is asked to shake the contents so that gas may be dissolved with the liquid and then to remove the cap to consume the contents through the straw 20. Turning to, for example, Figures 12 and 13, the '671 reference merely describes a device having a serrated nozzle 310 for discharging whip cream pressurized with nitrous oxide.

Nothing whatsoever in the '671 reference even remotely suggests the discharge of a liquid beverage from a container directly into the mouth of a consumer from a dispenser wherein the liquid is an effervescent fluid. The liquid being discharged directly into the mouth of the consumer, as set forth in the claimed invention, is held under a gaseous pressure. The '671 reference clearly describes a bottle or container that has to be opened to the atmosphere before a beverage or liquid may be consumed into the mouth of a consumer. Moreover, the beverage or liquid consumed via the bottle described in the '671 reference requires negative pressure (i.e., the suckling effect of the consumer) in order to draw the liquid from the bottle.

It is clear that all of the important and critical limitations set forth in the presently claimed invention are not found in the '671 reference. Therefore, Applicants respectfully request that the novelty rejection be withdrawn and rendered moot.

II. Rejection Under 35 USC §103

The Examiner has rejected claims 1, 4 and 9 under 35 USC §103 as being unpatentable over Hoffman, U.S. Patent No. 5,740,079 (hereinafter '079). In the rejection, the Examiner mentions, in summary, that the '079 reference is directed to an effervescent beverage (i.e., oxygen saturated beverage) wherein the beverage is tea, coffee, root beer or water held in a container at 2-6 atmospheres. The Examiner further mentions that the '079 reference is silent as to the teaching of a particular temperature in combination with the pressure, but that the reference teaches an amount of oxygen dissolved at a given pressure so that halitosis may be eliminated for the consumer. The Examiner concludes that it would be obvious to select any particular storage temperature and the desired level of oxygen in order to control halitosis. In this regard, the Examiner believes that the obviousness rejection is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Applicants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, the present invention is directed to a beverage product comprising a dispenser and a beverage whereby the dispenser has a container for holding the beverage and a valve which is biased to a position where it seals the container but is operable to enable the beverage to be dispensed from the container

and in which the beverage is a liquid having a sparingly soluble effervescent inducing gas dissolved therein. The beverage claimed is characterized in that it is held under gaseous pressure in the headspace above the liquid beverage in the container wherein the pressure is sufficient to cause the beverage to be discharged directly into the mouth of the consumer from the dispenser as an effervescent fluid when the valve is open via the consumer's mouth. The invention of claim 1 is further defined by the dependent claims which claim, among other things, that the effervescent gas is oxygen, and that the beverage may be tea or coffee.

In contrast, the '079 reference is directed to an oxygenated beverage useful to alleviate halitosis. The beverage of the '079 reference preferably has an ozonized oxygen. There is nothing in the '079 reference that suggests the beverage used for ingestion, gargling or spraying is to be fed directly into the mouth of a consumer from a dispenser when the valve is open by the consumers mouth as claimed in the present invention.

Since all the important and critical limitations set forth in the presently claimed invention, as amended, are not found in the '079 reference, it is respectfully submitted that the obviousness rejection be withdrawn and rendered moot.

### III. Rejection Under 35 USC §103

The Examiner has rejected claim 10 under 35 USC §103. In the rejection, the Examiner mentions claim 10 is unpatentable over Hoffman, U.S. Patent No. 5,747,079 (hereinafter '079) as applied to claims 1, 4, 9 above and further in view of Denton et al., U.S. Patent No. 5,971,357 (hereinafter '357).

In the rejection, the Examiner mentions, in summary, that the '079 reference is silent as to describing an actuator having a valve that opens via engagement in a user's mouth or teeth. Nevertheless, in an attempt to cure the vast deficiencies of the '079 reference, the Examiner relies on the '357 reference for showing a valve that can be positioned for engagement in a user's mouth. In view of this, the Examiner believes that claim 10 is properly rejected under 35 USC §103.

Notwithstanding the Examiner's apparent position to the contrary, it is the Applicants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, the present invention is directed to a beverage product comprising a dispenser and a beverage wherein the beverage is pressurized and suitable to be discharged directly into a consumer's mouth when a valve in the beverage product is opened via a consumer's mouth.

In contrast, the '079 reference is directed to an oxygenated beverage that is useful to alleviate halitosis. The '357 reference is directed to a fluid delivery valve that can be used with liquids in laboratories, hospitals and with pilots or astronauts requiring nourishment whereby the same are typically required to wear protective suits and preferably have one or both hands free. There is no motivation whatsoever to modify the teachings of the '079 reference by the teachings of the '357 reference since individuals who are concerned with halitosis generally are not wearing protective suits and are not concerned about having both hands free. Since the '079 reference is directed to a beverage for alleviating bad breath, one of ordinary skill in the art would not modify the teachings of the '079 reference by employing an expensive valve

mechanism like the one described in the '357 reference which is particularly useful for those wearing protective suits, including astronauts.

Since it is clear that the Examiner has not established a *prima facie* case of obviousness under 35 USC §103, Applicants respectfully request that the rejection made to claim 10 be withdrawn and rendered moot.

IV. Rejection Under 35 USC §103

The Examiner has rejected claim 11 under 35 USC §103 as being unpatentable over Hoffman, U.S. Patent No. 5,747,079 (hereinafter '079) in view of Denton et al., U.S. Patent No. 5,971,357 (hereinafter '357) as applied to claim 10 above and further in view of Bergman, SE 9801752 A (hereinafter '752A). The Examiner mentions that the '752A reference teaches a water dispensing valve operated by biting and that the same additionally utilizes a button to control the amount of water dispensed based on the bite pressure applied to the button. In view of this, the Examiner believes it would have been obvious to modify the '079 reference to include a button on the bite valve since the '752A reference teaches a means of controlling the amount of dispensing by bite pressure. Thus, the Examiner believes that the obviousness rejection is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Applicants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, the present invention is directed to a beverage product comprising a dispenser and a beverage wherein the beverage is held under gaseous

pressure and can be discharged directly into the mouth of a consumer when a valve on the beverage product is opened via the consumer's mouth. The invention is further defined by claim 11 which mentions that an actuator means of the beverage product can include a button mounted in an outlet portion such that the button can be moved by a biting action.

Again, the '079 reference is directed to a beverage product for controlling halitosis. The '357 reference is directed to a fluid delivery valve suitable to deliver nourishments to those typically required to wear protective suits and having a need to keep one or both hands free. The '752A reference is directed to a valve with a sleeve button so that animals can bite on the valve in order to release water. Such a mechanism appears to be the type found in a bird, dog or gerbil cage. There is no motivation whatsoever for modifying the teachings of the '079 reference which merely describe a beverage for halitosis. This is true because an individual attempting to cure a halitosis problem normally does not have both hands occupied. Moreover, the sleeve button described in the '752A reference appears to have a spring mechanism for releasing water which is not typically under pressure. In view of this, the Examiner has not established a *prima facie* case of obviousness by combining the '079, '357, and '752A references. In view of this, Applicants respectfully request that the obviousness rejection be withdrawn and rendered moot.

V. Rejection Under 35 USC §103

The Examiner has rejected claims 12 and 13 under 35 USC §103 as being unpatentable over Frutin, WO 98/36671 (hereinafter '671) as applied to claims 1, 3, 7, 8, 15 and 16, further in view of Kohler et al., U.S. Patent No. 5,143,288 (hereinafter '288). In the

rejection, the Examiner mentions, in summary, that the '671 reference teaches an aerosol valve in a container and that the '288 reference describes aerosol valves for a container having a liquid and a dip tube. In view of this, the Examiner believes that the obviousness rejection is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Applicants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, the present invention is directed to a beverage product having a dispenser and a beverage therein whereby the beverage is held under gaseous pressure and discharged directly into the mouth of a consumer when a valve is opened via the consumer's mouth. Claims 12 and 13 further define that the independent claim by the inclusion of a specific dip tube that has an aperture which communicates between the headspace above the beverage in the container and the interior of the dip tube to enable gas in the headspace to be entrained in fluid being dispensed through the dip tube when the valve is in the open position.

In contrast, and as already made of record, the '671 reference is directed to a method of producing a froth liquid. The contents in the container or bottle of the '671 reference is consumed by the consumer after the bottle or container has been opened to the atmosphere. The beverage or liquid consumed via the bottle described in the '671 reference requires negative pressure in order to draw liquid from the bottle. Nothing is consumed under pressure utilizing the bottle described in the '671 reference. The '288 reference does not cure any of the vast deficiencies of the '671 reference because the '288 reference is merely directed to an apparatus to produce and maintain an effective

aerosol spray. One would not combine the teachings associated with an aerosol spray with that of a container that is to be opened prior to the consumption of a beverage. Thus, the Examiner has not established a *prima facie* case of obviousness as required under 35 USC §103 and it is respectfully requested that such rejection be withdrawn and rendered moot.

VI. Rejection Under 35 USC §103

The Examiner has rejected claim 14 under 35 USC §103 as being unpatentable over Frutin, WO 98/36671 (hereinafter '671) in view of Kohler et al., U.S. Patent No. 5,143,288 (hereinafter '288) as applied to claims 12 and 13 above and further in view of Berg et al., U.S. Patent No. 3,947,567 (hereinafter '567). In the rejection, the Examiner mentions, in summary, that the '671 reference teaches an amount of gas discharged with a liquid when the effervescent beverage is expelled. The Examiner admits that the '671 reference is silent in teaching any particular amount of gas discharged with a liquid but relies on the '567 reference for allegedly explaining a particular desired degree of effervescence for products. Thus, the Examiner believes that the obviousness rejection is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Applicants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, the present invention is directed to a beverage product having a dispenser and a beverage, the beverage being discharged under pressure directly into the mouth of a consumer when a valve is opened via the consumer's

mouth. Claim 14 further defines the invention by identifying a quantity of gas expelled from the beverage container when the valve is opened.

In contrast, and again, the '671 reference is merely directed to a bottle or container that has to be opened to the atmosphere before a beverage or liquid may be consumed. The '567 reference, on the other hand, doesn't cure any of the vast deficiencies of the '671 reference since the '567 reference is merely directed to effervescent cleaners. There is no motivation whatsoever to combine teachings which suggest consuming a beverage by opening a container to the atmosphere with a reference that is directed to effervescent cleaners. In view of this, it is clear that the Examiner has not established a *prima facie* case of obviousness as required under 35 USC §103. Applicants, therefore, respectfully request that the obviousness rejection be withdrawn and rendered moot.

#### VII. Rejection Under 35 USC §103

The Examiner has rejected claims 17 and 18 under 35 USC §103 as being unpatentable over Frutin, WO 98/36671 (hereinafter '671) as applied to claims 1, 3, 7, 8, 15, 16 further in view of Frutin, WO 97/21605 (hereinafter '605). In the rejection, the Examiner mentions, in summary, that the '671 reference teaches a container that may be fitted with a device which injects flavor into the container and that the '605 reference teaches a container having a supplemental compartment with sparingly soluble effervescent inducing gas and a liquid that releases the contents upon opening the container while relieving the pressure within the container. In view of this, the Examiner believes that it would be obvious to modify the '671 reference and to include

a widget for releasing the gas and a flavor when a valve is opened. Thus, the Examiner believes that the obviousness rejection is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Applicants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, the '671 reference requires that a bottle or container be opened to the atmosphere before a beverage or liquid may be consumed into the mouth of a consumer. The '605 reference, on the other hand, merely discloses a device for releasing a fluid into a liquid already within a container. No combination whatsoever of the references relied on by the Examiner even remotely suggests a beverage product comprising a dispenser and a beverage wherein the beverage is dispensed directly into the mouth of a consumer and held under gaseous pressure whereby a valve on the beverage product is opened via the consumer's mouth. Claims 17 and 18 further define the present invention by including a widget that contains concentrated flavor that is released into the container when the valve is opened. None of these important and critical limitations are even remotely found in the combination of references relied on by the Examiner. A *prima facie* case of obviousness has not been established and it is respectfully requested that the obviousness rejection be withdrawn and rendered moot.

Applicants submit that all claims of record are now in condition for allowance. Reconsideration and favorable action are earnestly solicited.

Applicants submit that all claims of record are now in condition for appeal.

In the event the Examiner has any questions or concerns regarding the present patent application, he is kindly invited to contact the undersigned at his earliest convenience.

Respectfully submitted,



Edward A. Squillante, Jr.  
Attorney for Applicant(s)  
Reg. No. 38,319

EAS:pod  
(201) 894-2925